RECURRING LITIGANTS: FEDERAL AGENCIES BEFORE THE SUPREME COURT

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CONTEMPORARY analysis of the United States Supreme Court has largely ignored the possible impact of the litigants per se on the Court's decision making. In part this is because for most parties, an appearance before the Supreme Court is a singular or relatively rare event. And in part, it is because those few parties who do appear frequently before the Court, e.g., the Department of Justice, do so in a whole spectrum of cases arising in very different circumstances and treated by a variety of procedures. Some federal administrative agencies do, however, appear before the Court several times each term; moreover, the problems presented in such cases are normally encompassed in a relatively narrow scope of procedural and substantive issues.

One might anticipate that such extended interaction between the agencies and the Court would introduce a new dimension into decision making in these cases. Past experiences with cases involving a particular agency might affect the Court's — or at least some justices' — perceptions of cases brought in the future. That is, the justices are likely to form general attitudes about the goals of a particular agency's policies or the fairness of its procedures on the basis of such continued exposure and reflect these attitudes in their voting behavior. Some thirty-five years ago, Chief Justice Hughes broadly hinted that this was indeed what happened. In *St. Joseph Stockyards Co.* v. *United States*, he stated: [1]

> Agencies with varying qualification work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. . . . To say that their findings . . . may be made conclusive [where the rights of liberty and property are concerned] is to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not to be lightly regarded.

If such residual evaluations (expert, subservient, etc.) of particular agencies are operative in the Court's decision making, it is highly likely that the Court would manifest differential support levels for various agencies.

This paper seeks to examine three aspects of Supreme Court–federal agency relationships. The first is whether the Court does in fact manifest different levels of support for different agencies. The second involves the attitudes of the individual justices toward various agencies. Do they share a common perception of the agencies' strengths and deficiencies or do they have sharply divided or disparate evaluations of the behavior of various agencies? The third involves the nature of the agencies' actions which evoke nonsupportive Court decisions. Do such decisions result primarily from negative reactions to the agencies' standards of procedural and evidentiary fairness or do they stem from an adverse evaluation of the agencies' substantive policies or goals?

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[1] 298 U.S. 38, 52 (1936).

In order to examine these questions data were gathered on Supreme Court decisions in administrative cases from the 1957–68 terms. The focus of this paper was narrowed to six federal agencies whose number of appearances before the Court were numerous enough to be suitable for analysis.[2] The agencies of concern were the Federal Power Commission (FPC), Federal Trade Commission (FTC), Interstate Commerce Commission (ICC), National Labor Relations Board (NLRB), Internal Revenue Service (IRS), and Immigration and Naturalization Service (INS). For similar reasons the votes of two justices with little service during this time span were excluded from consideration: Burton and Marshall.

A perusal of the percentage of supportive decision by the Court for each agency (Table 1) indicates that differentials in support are in fact present. The Court upholds the actions of two agencies, the FPC and the FTC, more than nine times out of ten, while its support for the INS barely exceeds one instance in two.[3]

TABLE 1

PERCENTAGE OF SUPPORTIVE DECISIONS BY AGENCY

(1) Federal Power Commission	91.3
(2) Federal Trade Commission	90.9
(3) National Labor Relations Board	74.5
(4) Internal Revenue Service	73.3
(5) Interstate Commerce Commission	63.4
(6) Immigration and Naturalization Service	56.3

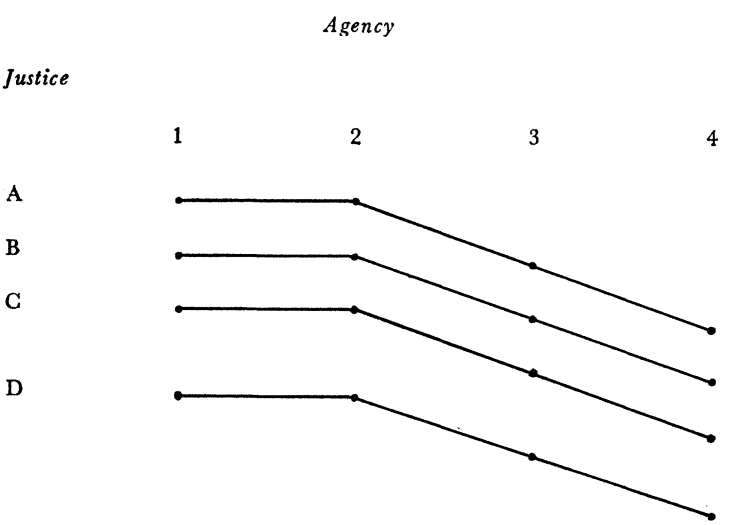
These aggregate figures, however, do not tell us much about the attitudes of the justices individually. The scores could closely reflect the attitudes of most or all of the members of the Court toward the six agencies, but they also could conceal a great deal of variation in their attitudes. We can posit two basic models of the justices' attitudes. In the first, all justices would have a more or less similar attitude toward each agency's policies and procedures. In other words, each justice may individually follow the aggregate pattern of support detailed in Table 1. This model (Model One) is illustrated in Figure 1 showing the justices to have harmonic supportive patterns. Under this model, any variations in the overall support level each justice gives to federal administrative agencies generally would reflect the intrusion of other dimensions — most important, perhaps, his consideration of whether the Court should be "active" or "restrained" in reviewing agency policies and procedures. But differentials in support given each agency by the Court would be attributed to common attitudes toward particular agencies held by the justices.

[2] Other agencies for which data were collected included the FCC, FDA, SEC, and Social Security. None of these agencies accounted for more than six cases in the time period selected. Of the agencies included, the INS had the fewest cases with 16.

[3] It is interesting to compare the Supreme Court of the 1960s in this respect with that of the 1940s. See C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948), p. 190 (Table XIX), which shows that administrative agencies generally received about the same level of support from the earlier Court, but the ICC and the NLRB received greater support than now while the FPC and the FTC had less. (Pritchett gave no data on the IRS or the INS.)

FIGURE 1

MODEL ONE — HARMONIC ATTITUDES



In the second, the justices would be quite disharmonic in their attitudes toward the agencies. Some might support a given agency nearly all the time while others may almost always oppose it. This could result from factional division among the justices over ideological or legal issues connected with the agencies or even, theoretically, be a case of near-random dispersion of attitudes toward agencies. This model (Model Two) is illustrated in Figure 2 (as a factional division). If Model Two is operative, the differentials in support given each agency by the Court merely reflect the outcome of factional disputes or at best the sum total of disparate, patternless attitudes.

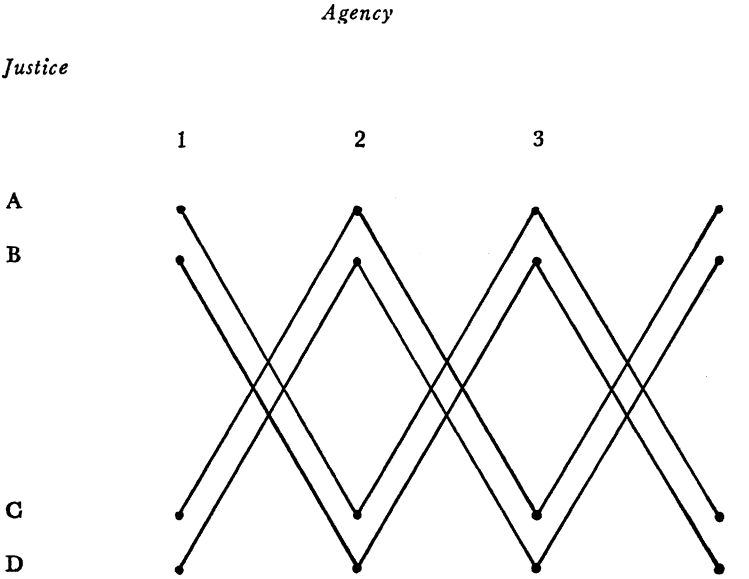
To investigate which model more nearly describes the justices' behavior, the percentage of pro-agency decisions are presented in Table 2, cross-classified by justice and agency. Under a pure Model One situation, there should be statistically significant variations in the agencies' average support scores (column means) and perhaps some variation (although not necessarily significant) in the justices' average support scores (row means). Under a pure Model Two situation, the factional or random nature of the justices' votes would cancel each others' patterns out and no major differences between either column or row means should occur. While complete purity in the Model Two situation is in reality precluded here by the fact that the Court as a body has manifested different support levels for different agencies, these variations could result from very close votes and a situation approximating Model Two is certainly possible.

The differences between the agencies' average support scores are significant at the .01 level using an analysis of variance technique.[4] Moreover, there is some

[4] See George W. Snedecor and William G. Cochran, *Statistical Methods* (Ames, Iowa: Iowa State University Press, 1967), chaps. 10 and 11.

FIGURE 2

MODEL TWO — DICHOTOMIZED ATTITUDES



variation in the justices' average support scores, although it does not attain statistical significance. These findings tend to indicate that the interaction is closer to that portrayed in Model One than that shown in Model Two, although a situation closer to that shown in Model Two can not be absolutely dismissed as yet.

To test further the applicability of the two models, we have examined the dispersion of justices' support scores for each agency. If the situation approximates Model One, the justices' support scores for each agency should cluster around the average support score for that agency (column means). If the situation is closer to Model Two, the justices' support scores for each agency should be highly divergent from the mean for that agency. A detailed examination of Table 2 shows that most of the justices' support scores do not vary markedly from the mean support score for most agencies. To reinforce this impression, we have calculated the standard deviation for the support scores for each agency. With one exception, they are low to moderate. In other words, the justices' support scores tend to cluster around the mean and are not widely dispersed from it.[5] This clearly indicates that the justices have relatively harmonic attitudes toward the various agencies (Model One) rather than factionally clashing or disparate attitudes toward them (Model Two).

There is one clear exception to this finding. In the case of the INS, obvious blocs of highly supportive and highly nonsupportive justices appear. The INS

[5] Where the distribution of scores approaches normality, about two-thirds of them should be encompassed within ± one standard deviation of the mean. If the distribution is dichotomized, a smaller fraction of the scores will fall within a much larger standard deviation.

TABLE 2

PERCENTAGE OF SUPPORTIVE DECISIONS CROSS CLASSIFIED BY JUSTICE AND AGENCY

	FPC	*FTC*	*NLRB*	*IRS*	*ICC*	*INS*	$\overline{X}$	*N*
White	93.3	100.0	89.3	88.2	72.7	77.8	86.9	105
Fortas	100.0	100.0	100.0	50.0	90.9	50.0	81.8	49
Clark	85.0	90.0	66.0	80.0	56.4	78.0	76.0	180
Stewart	68.2	70.6	66.7	65.7	73.3	83.3	71.3	163
Whittaker	83.3	44.4	70.8	76.9	60.0	85.7	70.2	94
Brennan	87.0	95.2	75.9	73.3	59.5	25.0	69.3	201
Harlan	69.6	54.5	65.5	71.1	71.4	80.0	68.7	202
Warren	82.6	95.5	74.5	75.6	57.1	25.0	68.4	203
Frankfurter	66.7	54.5	70.8	84.6	76.2	50.0	67.1	98
Goldberg	87.5	80.0	70.0	83.3	40.0	20.0	63.5	46
Black	82.6	95.2	65.5	66.7	46.3	20.0	62.7	197
Douglas	82.6	90.9	61.1	34.1	47.6	6.9	53.9	201
$\overline{X}$	82.4	80.9	73.0	70.8	62.6	50.2		
N	23	22	55	45	41	16		
Standard Deviation	10.0	19.9	11.1	15.4	14.7	29.8		

has by far the largest standard deviation, more than twice as large as that of most other agencies. In fact, only two of the justices have support scores within $\pm$ 25 percent of the INS mean.[6]

Although we have found that in general differential levels of Court support result from justices' concurrent shifts in attitudes toward any given agency, we do not know what factors associated with the agencies evoke these attitudes. Let us explore this last question by considering two broad suggestions which are sometimes discussed explicitly or implicitly in the literature of administrative law and politics.

The first, put in its most simplistic form, is that the Supreme Court as a court of law, is neutral or unconcerned with questions of substantive policy established by administrative agencies, but does have strong preferences on procedural issues emanating from agency decisions. Thus, agencies which meet certain criteria more or less traditionally associated with the concept of due process of law (e.g., proper notice, impartial hearing, decisions made in accordance with ascertainable evidentiary rules or standards, etc.) are supported by the Court and those which often fail to meet such standards are not supported. While no one has pointed the way to a clear test of this argument by, say, ranking agencies on due process standards, suggestions along this line are implicit in the literature. Kenneth Culp Davis in his work on administrative law, concentrates on such issues and suggests that they are

[6] Pritchett, op. cit., found that a situation approximating Model Two existed in relation to two agencies, the ICC and the NLRB. See p. 190 (Table XX) and p. 208 (Table XXI). He does not break down the justices' voting for other agencies. As he was discussing bloc-type divisions on the Court, however, it seems likely that had the justices' attitudes toward other agencies approached the Model Two situation, Pritchett would have noted it.

a primary, if not exclusive factor, in determining Supreme Court decisional outcomes.[7] Other scholars in the field of administrative law do likewise.[8]

The second suggestion, put bluntly, is that the Supreme Court "likes" or "approves" the overall goals and the substantive policies of some administrative agencies while it is at best dubious about the general goals and implementing policies of other agencies. In other words, because the justices feel comfortable with the substantive policies of agencies such as the FPC and the FTC, they virtually always uphold their actions and because they often doubt the wisdom of, say, INS or ICC policies, they give the actions of these agencies only middling support.

This was Tanenhaus's main line of argument in his exploration of federal agency–Supreme Court relationships.[9] He hypothesized that the justices' voting behavior would indicate or reflect their values on four substantive policy issues: labor-management regulation, freedom of competition, freedom of person, and the government's financial interest. Implicit in his hypothesis is an assumption that the justices' individual preferences here will be distributed in such a way so that the Court, through its decisional outcomes, will be seen as having substantive policy preferences. On the opposite side of the coin, Tanenhaus predicted that the justices — and presumably the Court as a whole — would show no marked variations in support behavior on three legal questions: due process of law, evidentiary issues, and statutory authority, when substantive policy issues were controlled.[10] The positive aspects of Tanenhaus's hypotheses were not borne out very well by his data; only a minority of justices seemed to cast their votes on the basis of significant policy preferences and the Court as a whole did not seem strongly committed in these areas. However, the prediction that the justices would manifest no clear behavior pattern in terms of the legal questions involved was largely validated by his data.

With more sophistication, and with some reservations, Martin Shapiro makes the same argument.[11] In various studies of the Court's relations with four agencies, three upon which we report data, the NLRB, FPC and IRS, and, in addition, the Patent Office, he generally argues that Court support or nonsupport has been given to the agency as a result of the justices' evaluations of the agency's substantive poli-

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[7] Kenneth Culp Davis, *Administrative Law and Government* (St. Paul: West Publishing Company, 1960). Although a lawyer, Davis directed this particular work to political scientists. He is not oblivious to the role of policy preferences. See pp. 6–7.

[8] See, e.g., Peter Woll, *American Bureaucracy* (New York: Norton, 1963), pp. 104–8; Louis Jaffe and Nathan Nathanson, *Administrative Law: Cases and Comment* (Boston: Little, Brown, 1961).

[9] Joseph Tanenhaus, "Supreme Court Attitudes Toward Federal Administrative Agencies," *Journal of Politics*, 22 (1960), 502–24.

[10] Tanenhaus was focusing on substantive policies, not agencies. He did not report any agency-by-agency breakdown for his data. Most substantive policies, however, are closely associated with a particular agency, e.g., labor relations with the NLRB or government financial interest with the IRS. Consequently, an hypothesis to the effect that the Court has strong preferences in a given policy area is but one step removed from an hypothesis that variation in the Court's support for different agencies is related to the Court's attitudes toward the agency's policy output in its dominant area of interest.

[11] Martin Shapiro, *Law and Politics in the Supreme Court* (New York: Free Press, 1964), chaps. 3 and 4; Martin Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968), chaps. 3 and 4.

cies. Shapiro's analyses are detailed and contain considerable qualifications of the main theme (especially in the case of the NLRB), but he is saying, at bottom, that substantive agency policy is a primary factor in determining Supreme Court support levels.

Pritchett in his study of the Court in the 1940s pointed to several dramatic instances where the Court (or individual justices) would approve given procedures in one agency and reject them when used by another agency (or even, on occasion, the same agency in a later case). He concluded that substantive policies rather than procedural issues were the most important determinant of support during this era.[12]

It is all but impossible to test the relative validity of these two explanations directly. Supreme Court cases can seldom be dichotomized into those involving questions of policy preference and those involving questions of law. The Supreme Court is, after all, a court and all of its decisions are ostensibly couched in terms of legal questions and not policy preferences. Nonetheless, some legal questions are usually rather isolated from overall questions of administrative agency policy while others are generally more closely linked to matters of policy. Questions of procedural fairness and evidentiary standards are an example of the former. The high court will often rule that an agency has treated a client unfairly, even though the justices may well have no objection to the agency's policy goals in the case. In such situations, the application of legal standards to agency decisions may also be mentally divorced without too much difficulty from substantive policy preferences. Many Supreme Court cases, however, involved a decision about whether the agency has the statutory authority to pursue a particular policy or whether an agency in pursuit of a policy is interpreting statutes correctly. Statutory authorizations or provisions are often notoriously vague and ambiguous (e.g., the FPC should set "just and reasonable rates," the FTC should suppress "unfair trade practices," and the FCC should regulate in the "public interest, convenience and necessity.") In such cases, it would seem more difficult for the justices to separate their "second guessing" of the agency from their views on the agency's policy goals.

Comparison of the Court's behavior in those legal questions which seem more isolated from policy preferences with those which are given to greater involvement with them should give us some insights into the relative viability of these two hypotheses. Table 3 shows such a comparison. Presumably, if variation in the Court's support levels were largely a function of the Court's approval or disapproval of the agency's behavior on the due process dimension, then support on this dimension should fall more or less monotonically as we run down the table from the FPC to the INS. At the same time, support on the statutory authority and interpretation dimension should not vary greatly across agencies. Conversely, if policy preferences are the key to support levels, support should fall on the latter dimension and show no meaningful variation on the first one.

The table indicates that variation occurs on both dimensions and thus they both have an impact on variation in overall support. But attitudes toward substan-

[12] Pritchett, op. cit., chap. 7.

TABLE 3

SUPREME COURT SUPPORT SCORES FOR SIX AGENCIES ON PROCEDURAL AND STATUTORY AUTHORIZATION/INTERPRETATION DIMENSIONS

Agency	Procedural Cases		Statutory Cases		Overall Support	
	Score	N*	Score	N*	Score	N*
FPC	80.0%	(10)	100.0%	(16)	91.3%	(23)
FTC	90.0	(10)	91.7	(12)	90.9	(22)
NLRB	70.0	(20)	75.0	(40)	74.5	(55)
IRS	85.7	(7)	70.0	(40)	73.3	(45)
ICC	73.3	(30)	69.3	(26)	63.4	(41)
INS	20.0	(5)	66.7	(12)	56.3	(16)

* *N*'s for the two dimensions will usually add up to more than the total number of cases for each agency because some cases present both procedural and statutory questions to the Court. In the dimensional columns, such cases contribute to the support score if the Court upheld the agency on the dimensional issue. In the overall support score column, such cases contribute to the score *only* if the Court upheld the agency on both dimensional issues.

tive policy questions seem more important and more determinative. Support scores on this dimension decrease monotonically in the same manner as overall support scores. As support scores on the procedural dimension have (excepting the INS) only a 20 percent range and do not align well with overall support scores, it is clear that their impact is the lesser of the two.

The INS, of course, stands as a dramatic exception. It is clearly in the Court's procedural "doghouse" when compared to the other agencies or to itself on the substantive dimension. While the small *N* here cautions against broad pronouncements, it seems that this is one agency in which the Court perceives procedures to be relatively deficient.

At this point we can summarize our findings. First, we have observed that among those federal agencies which were frequently parties to cases before it, the Supreme Court was considerably more receptive to the claims of some than it was to those of others during the 1957–68 terms. Further, this variation in the levels of Court support appears largely to be the result of a congruent variation in the justices' attitudes toward the six agencies and is not merely the abstract summation of votes reflecting factional clashes or randomly dispersed attitudes.

Two factors which might explain this variation were examined: differences in the agencies' adherence to standards of procedural and evidentiary fairness and differences in the agencies' substantive policies and goals. The latter difference was found to be more determinative of variation in the Court's overall support levels for the different agencies. In other words, variance in the Court's willingness to support an agency as a recurring litigant stems largely from the justices' attitudes toward the agency's substantive policies rather than its procedural behavior.

The INS is an exception to these generalizations in two respects. First, its behavior is clearly the object of clashing legal or ideological attitudes among the justices rather than of common perceptions. Actually, it is the INS's substantive cases (statutory authorization and interpretation) which provoke the judicial disagreement; the dichotomization did not occur in the procedural dimension cases.

Second, in contrast to the procedural behavior of the other five agencies which received an almost uniformly high level of support from the Court, the INS's procedures met with a quite negative reception. In other words, while the procedural dimension generally did not affect variation in the Court's overall support for the agencies very much, it did materially contribute to the INS's relatively low overall support score.